Office Supreme Court, U.S
FILED
JUL 3 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1924

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER 1984

CITY OF POMPANO BEACH,

Petitioner,

vs.

RICHARD MAYNARD CAPALBO,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE
FOURTH DISTRICT COURT
OF APPEAL OF FLORIDA

MEMORANDUM FOR RICHARD MAYNARD CAPALBO IN OPPOSITION

Bruce E. Wagner, Esq.
WAGNER & KOLLRA, P.A.
1520 S.E. 3rd Avenue
Ft. Lauderdale, Fla. 33316
Telephone: (305)467-2602

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

REASON FOR DENYING THE WRIT.....1

SECTION 31.60 OF THE CITY OF POMPANO BEACH MUNICIPAL CODE IS UNCONSTITUTIONALLY OVERBROAD AND IS VOID FOR VAGUENESS FOR IT FAILS TO GIVE AN INDIVIDUAL FAIR NOTICE OF WHAT CONDUCT IS PROHIBITED AND BECAUSE IT ENCOURAGES ARBITRARY ENFORCEMENT.....1

APPENDIX

§31.66, City of Pompano Beach Municipal Code.....App.1

TABLE OF AUTHORITIES

Clark v. Community for Creative Non-Violence, —US—, (1984)...7

Collautti v. Franklin, 439 US 391 (1979).....2

Connally v. General Construction Co., 269 US 385 (1926).....2

Grayned v. City of Rockford, 408 US 111, 120 (1959) (Black, J, concurring).....2

Gregory v. City of Chicago, 394 US 589, 603-604 (1967).....6

Keyishian v. Board of Regents, 385 US 589, 603-604 (1967).....2

Kolender v. Lawson, 461 US 352 (1983).....2,8

Lewis v. City of New Orleans, 415 US 130, 135 (Powell, J, concurring).....6

Papachristou v. City of Jacksonville, 405 US 156 (1972).....2

Smith v. Goguen, 415 US 566 (1974).....2,3,6

United States v. Harriss, 347 US 612, 617 (1954).....2

United States v. Petrillo, 332 US 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947).....9

United States v. Reese, 92 US
214 (1875).....3

Statutes and Ordinances:

Pompano Beach, Florida, Code,
§31.66 (1972).....1,4,8

NO. 84-1924

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984

CITY OF POMPANO BEACH,

Petitioner,

vs.

RICHARD MAYNARD CAPALBO,

Respondent.

REASON FOR DENYING THE WRIT

SECTION 31.60 OF THE CITY OF POMPANO BEACH MUNICIPAL CODE IS UNCONSTITUTIONALLY OVERBROAD AND IS VOID FOR VAGUENESS FOR IT FAILS TO GIVE AN INDIVIDUAL FAIR NOTICE OF WHAT CONDUCT IS PROHIBITED AND BECAUSE IT ENCOURAGES ARBITRARY ENFORCEMENT

The Municipal Ordinance which is the subject of this Petition, prohibits any individual from sleeping in any vehicle in any public property within the City limits of Pompano Beach, Florida. Pompano Beach, Florida, Code, §31.66 (1972)(A.1.).

This Ordinance is void for vagueness both in the sense it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v. Harriss, 347 US 612, 617 (1954), and because it encourages arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 US 352 (1983); Smith v. Goguen, 415 US 566 (1974); Grayned v. City of Rockford, 408 US 104 (1972); Papachristou v. City of Jacksonville, 405 US 156 (1972); Connally v. General Construction Co., 269 US 385 (1926). It is exceptionally true in this case because the uncertainty induced by the Ordinance threatens to inhibit the exercise of constitutionally effected rights. Collautti v. Franklin, 439 US 391 (1972); Keyishian v. Board of Regents, 385 US 589, 603-604 (1967).

This Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimum guidelines to govern law enforcement." Smith, supra, 415 US at 574. Where, as in the present Ordinance, there are no such minimum guidelines, an ordinance or statute may permit "a standardless sweep (that) allows policemen, prosecutors and juries to pursue their personal predilections." Id. at 575.

As early as 1875, this Court, in United States v. Reese, 92 US 214 (1875), stated:

> It would certainly be dangerous if the legislature would set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some

> extent, substitute the judicial for the legiala-tive department of government. Id. at 221.

Section 31.66 as presently drafted, contains no standard for determining when one's conduct violates the Ordinance. As such, the Ordinance gives law enforcement officers unfettered discretion to determine whether or not to arrest an individual asleep in a vehicle on any public street, way or parking lot. By its very terms, the Ordinance essentially prohibits any person from sleeping in any public street, way, parking lot or other public property. Contrary to the Petitioner's assertion, the Ordinance in question does not confine itself to individuals sleeping in parked vehicles. Even if the City's interpretation of the Ordinance was correct, the Ordinance's constitutional infirmities would not be eliminated.

There are numerous examples of innocent conduct which can be labled as criminal under the Ordinance. The following conduct is criminalized by the Ordinance: (a) a passenger napping in a moving vehicle after enjoying a hot afternoon of Florida sunshine; (b) an alternate driver asleep in a Winnebago as it traveled through Pompano Beach on a trip from a northeast state to the Florida Keys; (c) an individual choosing to doze in a parking lot while he or she awaits the return of another individual from shopping; (d) an inebriated driver who chooses to sleep in his parked car rather than drive in an intoxicated condition and endanger his life or those of others.

These examples are just a few which enumerate the fact that the Ordinance contains no guidelines to constrain the

discretion of the police officer in deciding when to enforce the Ordinance. The Ordinance "entrust(s) lawmaking to the moment-to-moment judgment of the policeman on the beat," Smith, supra, 415 US at 575 (quoting Gregory v. City of Chicago, 394 US 111, 120 (1969) (Black, J, concurring), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." Lewis v. City of New Orleans, 415 US 130, 135 (Powell, J, concurring).

For the above-stated reasons, the Ordinance is also unconstitutionally overbroad. The reach of the Ordinance is so broad and over inclusive in that it criminalizes within its parameters conduct which is totally innocent. The subject Ordinance contains no distinction between conduct that is potentially harmful and conduct which is essentially innocent.

This Court's decision in Clark v. Community for Creative Non-Violence, 468 US, 82 L.Ed.2d 221, 104 S.Ct. (1984), is not applicable to this case as the issues in the two cases are totally divergent. In Clark v. Community for Creative Non-Violence, supra, the issue was whether a National Park Service regulation prohibiting camping in certain parks violated the First Amendment when applied to prohibit demonstrators from sleeping in Lafeyette Park and the Mall (National Parks in the heart of Washington, D.C.) in connection with a demonstration for the homeless. This Court answered the question in the negative, utilizing standards applicable to regulations concerning expression, because the regulation was for a reasonable time, place and manner of expression. Additionally, the regulation narrowly focused on the Government's interest in

maintaining the quality of the parks in our Nation's Capitol. Finally, the regulation complied with standards set for the regulation of expressive conduct.

The Petitioner asserts that the interest of the City of Pompano Beach, in promoting the aesthetic quality of the City, as well as the health, safety and welfare of its citizens justifies Ordinance §31.66. What the Petitioner fails to consider is that the language of the Ordinance in question sweeps so board as to encompass conduct that is innocent and does not promote any viable City interest. The concerns of the City cannot justify legislation that fails to meet constitutional standards for definiteness and clarity, Kolendar v. Lawson, supra, 461 US at 361. As stated in Kolendar, "although due process does not require 'impossible standards' of clarity,

see United States v. Petrillo, 332 US 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical." Id. at 361. Certainly the City of Pompano Beach can tailor an ordinance with more precision to meet constitutional muster and more narrowly reach those interests it may have intended to address in enacting the present Ordinance.

It is therefore respectfully submitted that the Petition for Writ of Certiorari filed by the City of Pompano Beach should be denied.

Respectfully submitted,

Bruce E. Wagner, Esq.
WAGNER & KOLLRA, P.A.
1520 S.E. Third Avenue
Ft. Lauderdale, Fla. 33316
Telephone: (305)467-2602

By: _____
Bruce E. Wagner

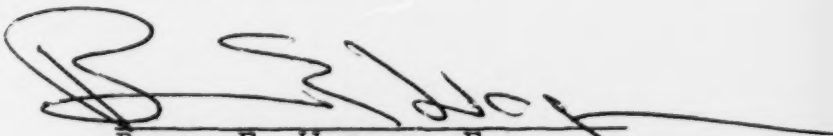
APPENDIX

§31.66
CITY OF POMPANO BEACH
MUNICIPAL CODE

It shall be unlawful for any person to lodge or sleep in, on or about any automobile, truck, camping or recreational vehicle or similar vehicle in any public street, public way, right-of-way, parking lot or other public property within the limits of the city.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this_____ day of July, 1985 to PHILIP J. MONTANTE, JR., P.A., Attorney for Petitioner, 1500 East Atlantic Boulevard, Pompano Beach, Florida 33060; JAMES R. WOLF, ESQUIRE, General Counsel, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302; and JAMES K. GREEN, ESQUIRE, Attorney for American Civil Liberties Union, 319 Clematis Street, West Palm Beach, Florida 33401.



Bruce E. Wagner, Esq.
WAGNER & KOLLRA, P.A.
1520 Southeast Third Avenue
Fort Lauderdale, Fla. 33316
Telephone: (305)467-2602